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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 219

ANTHONY FERNANDEZ, BURL ELTON DALGLIESH, and CARL G. PRATT, *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ANTHONY FERNANDEZ, BURL ELTON DALGLIESH, and CARL G. PRATT, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 26, 1964.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A19) is reported at 329 F. 2d 899.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A20) was entered on March 26, 1964. A timely petition for rehearing was denied on April 29, 1964 (Appendix B(2), *infra*, p. A20). On May 25, 1964, Mr. Justice Douglas granted an extension of time, to and including June 28, 1964, for filing a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is proper, where four defendants tried to a jury and a fifth tried to the court are jointly tried in the same proceeding for separate substantive offenses and for a conspiracy alleged to have been committed by all of whom, in a trial in which counsel for the fifth defendant participates actively, to submit the cases of the first four to a jury without permitting the jury ever to hear or learn of the testimony that the fifth defendant later gave to the court.

2. Whether, where four separate defendants are tried on several substantive counts in none of which all of them were named, as well as on a conspiracy count naming all of them that is held on appeal to have been insufficient, it was wrong as a matter of law to have denied a motion for severance at the close of the prosecution's evidence.

RULES OF CRIMINAL PROCEDURE INVOLVED

1. Rule 8, F.R. Crim. P., provides:

> **"Rule 8. Joinder of Offenses and of Defendants**
>
> **"(a) Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"**(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

2. Rule 14, F.R. Crim. P., provides:

"**Rule 14. Relief from Prejudicial Joinder**

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

3. Rule 23(a), F.R. Crim. P., provides:

"**Rule 23. Trial by Jury or by the Court**

"**(a) Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

STATEMENT

There are set forth below only enough facts, taken directly from the opinion below, to place the foregoing questions in their setting.

A. The Indictments

These petitioners were convicted on various counts of two indictments charging interstate frauds in violation of 18 U.S.C. § 2314 and conspiracy in violation of 18 U.S.C. § 371, as follows:

1. *Indictment No. 16845*

(a) Petitioner Fernandez was charged in counts 2 and 3 with a substantive offense under § 2314.

(b) Petitioner Fernandez and one Delay were charged in count 4 with a substantive offense under § 2314.

(c) Petitioners Fernandez and Dalgliesh and one Dual were charged in count 5 with a substantive offense under § 2314.

(d) Petitioners Fernandez and Dalgliesh and the said Dual were charged in count 6 with a substantive offense under § 2314.

(e) Petitioners Fernandez and Pratt and the said Dual were charged in count 7 with a substantive offense under § 2314.

2. *Indictment No. 16870*

(f) Petitioners Fernandez and Pratt and the said Dual were charged in count 1 with a substantive offense under § 2314.

(g) All three petitioners together with the said Dual and the said Delay were charged with conspiracy with each other and with one Sizer, named as a co-conspirator but not as a defendant (and who died prior to trial), to commit offenses in violation of 18 U.S.C. §§ 1341, 1343, and § 2314, the conspiracy being in violation of 18 U.S.C. § 371.

B. Pretrial Motions; Trial; Further Motion for Severance

After certain counts of Indictment No. 16845 that alleged bankruptcy frauds had been severed for trial, the several defendants' further motions for a severance from each other were denied. The defendant's Delay's waiver of a jury trial was accepted, and the trial judge ordered that the trial of Delay to the court proceed simultaneously as to the Government's case with the trial of these petitioners and Dual to the jury.

Delay was tried jointly with petitioners and Dual up to the time that the last four named rested. Delay's counsel joined the other counsel in voicing objections, participated

actively in the cross-examination, engaged in vior dire examination, and offered exhibits.

At the close of the evidence, petitioners moved for a severance, asserting that there was no single conspiracy binding all of the counts and the defendants together, but at most only a series of separate conspiracies, each involving some defendants. This motion was denied, petitioners and Dual rested, and their cases were submitted to the jury.

C. Delay's Testimony Not Submitted to Jury

Thereafter, Delay, who was being tried to the court alone, took the stand and testified in his own defense. When petitioners' counsel learned of this, they moved for a mistrial on the ground that evidence was received at the trial in the absence of the jury and without notice to petitioners. This motion was denied.

Alternatively, counsel for petitioners moved that their cases be reopened to hear Delay's testimony, pointing out that they could not have called him as a witness, and urging that, now that he had voluntarily testified, his testimony should be available to them.

Inquiry by the court indicated that some of petitioners would have been content to have had Delay's testimony read to the jury, while others thought he should testify in person and be subject to cross-examination. A complication arose from the fact that petitioners' cases had been submitted to the jury the day before, and that the foreman had already reported agreement on some counts. Petitioners' counsel indicated that it would accordingly be necessary to ask the jury on voir dire if they would be able to set aside their tentative determination in connection with the consideration of Delay's testimony.

The alternative motion to reopen was denied, and thereafter a motion for new trial on the ground, *inter alia*, of

the reception of Delay's testimony in the absence of the jury, was denied.

Thereafter verdicts were rendered. Petitioner Fernandez was convicted on all counts and sentenced to 11 years and 11 months. Petitioner Dalgleish was convicted on count 6 of the first indictment and on the conspiracy count of the second, and sentenced to 3 months. Petitioner Pratt was convicted on all counts in which he was named and sentenced to 2 years and 11 months. Dual was convicted on all counts in which he was named and sentenced to 3 months. Delay was acquitted by the court. Petitioners appealed, Dual did not.

D. Rulings of the Court Below

The rulings of the court below, insofar as those are pertinent to the questions now presented, were as follows:

1. With respect to the motion for mistrial based on the reception of Delay's testimony, the court below, finding that petitioners knew when they rested that Delay had not done so, and that he was planning to proceed with his defense, held that his decision was acquiesced in by petitioners, that accordingly there was no impropriety in the reception of his evidence, and that the motion for a mistrial was properly denied.

2. With respect to the motion to reopen the case for the presentation of Delay's evidence to the jury, the court below held that there was no abuse of discretion in denying that motion. Further, treating the motion as one for a new trial on the basis of newly discovered evidence, the court below held that petitioners were not entitled to a new trial on that ground.

3. With respect to the motions for severance at the close of the evidence, and petitioners' contention that the evidence was insufficient to support the verdicts of guilty on the conspiracy count, the court below held (a) that those

convictions could not stand as to petitioners Dalgliesh and Pratt because, assuming the existence of a single overall conspiracy as alleged, it was not shown that those two knew of its existence, nature or purpose, or that, with such knowledge, they voluntarily and wilfully acted in concert with others in furtherance thereof.

The court below further held (b), with respect to petitioner Fernandez, that evidence of a single overall conspiracy was wholly lacking, and that, at most, the evidence established several diverse conspiracies. On that ground the conspiracy conviction could not stand against any of the petitioners.

None the less, the court below went on to hold, in part on the authority of *Schaffer* v. *United States*, 362 U.S. 511, that (c) there was no abuse of discretion in denying the motion for severance made at the close of the evidence.

Accordingly, the court below reversed the convictions on the conspiracy count, directing its dismissal, and in all other respects affirmed petitioners' convictions. A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

We think that the manner of trial in this case, which imposed on these petitioners not only the burdens of a partial severance, so that they never had the benefit of Delay's testimony even though his counsel had participated actively in their trial, but also the burdens of a joinder, whereby the petitioners Dalgliesh and Pratt were tried jointly with other defendants with whom they were held by the court below to have had no connection whatever, so far impairs the integrity of criminal trials in district courts of the United States as to call for the exercise of this Court's supervisory powers. Indeed, we feel that the proceedings here fall within the condemnation of the court below in a case reported in the same volume of the Federal Reporter as this one, *Ramsey* v. *United States*, 329 F. 2d

432, 436: "We think the kindest thing to say is that this whole proceeding is so shot through with slipshod procedures and carelessness that appellant is entitled to a new trial."

First. It is one thing to conduct a unitary trial in which some issues are submitted to the jury and others to the court, as for instance a proceeding arising out of a maritime accident where the count for damages for negligence under the Jones Act is tried to the jury as a civil action while the count for maintenance and cure is tried to the judge as a suit in admiralty. E.g., *Jordine* v. *Walling*, 185 F. 2d 662, 671 (C.A. 3).

It is quite another to place five defendants on trial in a single criminal prosecution, which is spliced together by a conspiracy count in which all five are named, and then, after denying severance although one of the five waived trial by jury, to grant a partial severance that denies to the four jury-tried defendants the evidence of the other, where the latter had participated actively in the proceedings up to the time that the cases of the others were submitted to the jury.

The issue here concerns the integrity of a criminal trial, and that issue cannot be resolved, as the court below sought to do, by breaking it up into disparate segments. The issue here transcends questions as to whether petitioners should have contemplated Delay's going forward after they had rested, an approach that turns a trial involving the liberty of several citizens into a guessing match, a particularly hazardous forensic application of the technique of Russian roulette. Similarly, the issue involved is not met by inquiring whether there was or was not unanimity regarding the method of reopening the case. After all, such an unprecedented problem could hardly be expected to evoke a consensus of professional opinion. Nor is the issue met by asking whether the alternative motion to reopen was to be treated as a motion for new trial on the

footing of newly discovered evidence. For this was a course that petitioners did not so much as suggest. Indeed, to consider the question on that footing involves essentially the overtoppling of a straw man.

Assuming for present purposes that it was proper to combine in one trial the case against a defendant whose waiver of a jury had been accepted with the cases of four others who stood on their constitutional trial by a jury of their peers—and we wish to be free to question that assumption in the event that the present petition is granted—we submit that, at its barest minimum, such a combined trial must be treated as a single indivisible proceeding until such time as all of the proof offered by all of the parties is closed.

We have found no earlier instance of the "partial severance" practiced in this case, and we urge that this Court, by now granting review, proceed to disapprove what was done here so as to preclude any repetition thereof in the future.

Second. But petitioners were doubly prejudiced. Not only were all three denied the benefit of the testimony of Delay, whose counsel had injected himself actively into a trial that lasted 21 trial days in which 100 Government witnesses testified and some 275 exhibits were introduced, but, by being tried jointly on the strength of an unsupported conspiracy count, petitioners Dalgliesh and Pratt were necessarily involved in the trial of substantive counts with which their connection was never so much as alleged. Thus they were convicted under burden both of a partial severance as well as under the burden of a factually prejudicial joinder.

We are of course aware that *Schaffer* v. *United States*, 362 U.S. 511, did indeed sanction the submission to a jury of substantive counts against three separate defendants after the conspiracy count linking them together had been dismissed for insufficiency. We think that that decision

by a closely divided Court should be reconsidered, essentially because under its holding it is possible to try unrelated cases against different defendants together, with obvious prejudice to all. As was indicated by the dissenting opinion there (p. 524), "The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized," citing numerous authorities. See also Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 445.

Those criticisms, we submit, are not met by the decision in *Schaffer*. And we believe that they can never be properly answered, we are certain that the potential unfairness inherent in prosecutions for conspiracy can never be prevented, so long as *Schaffer* stands.

To be sure, in *Schaffer* the conspiracy count had been dismissed before the case was submitted to the jury, whereas here it was not found deficient until the case reached the court of appeals. But that does not add up to a difference of substance. In our view, it is error as a matter of law to permit unrelated substantive counts involving different defendants to be submitted to a jury together if the conspiracy count whose function it is to provide the nexus between those defendants is legally insufficient. That is to say, whether such insufficiency is ruled by the district court or by the court of appeals is immaterial; the joinder is improper, as a matter of law rather than of discretion, if the catch-all conspiracy count that links the otherwise unrelated defendants together is legally insufficient to do so. Consequently no valid differentiation can be rested on the particular stage of the proceeding at which the inadequacy of the asserted connection between the parties jointly tried is authoritatively adjudicated.

It is true that adoption of the standard we urge will make it hazardous hereafter for prosecutors to require several otherwise unrelated defendants to be tried together by adding to the several substantive charges against them

an additional allegation of conspiracy that as a matter of law is incapable of proof. But such a result, which would greatly minimize the frequently recognized injustices that inhere in conspiracy prosecutions, and which would virtually eliminate the possibility of verdicts that primarily reflect guilt by association—such a result, we submit, would in consequence be in the public interest, putting all emphasis on whether particular defendants have themselves committed [redacted] offenses.

CONCLUSION

The ruling below emphasizes—and compounds—the dangers involved in trying together numerous defendants who have been ruled unrelated to each other. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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